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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 73

**ANNA M. BOUTELL AND CARROLL M. BOUTELL,
DOING BUSINESS AS F. J. BOUTELL SERVICE
COMPANY, PETITIONERS,**

v.s.

**L. METCALFE WALLING, ADMINISTRATOR OF
THE WAGE AND HOUR DIVISION, UNITED
STATES DEPARTMENT OF LABOR**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 14, 1945.

CERTIORARI GRANTED JUNE 18, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 73

ANNA M. BOUTELL AND CARROLL M. BOUTELL,
DOING BUSINESS AS F. J. BOUTELL SERVICE
COMPANY, PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF
THE WAGE AND HOUR DIVISION, UNITED
STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION**

Civil Action File No. 3802

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff,

v.

ANNA P. BOUTELL and CARROLL M. BOUTELL, d. b. a. F. J. Boutell Service Company, Defendant

CALENDAR ENTRIES

June 1, 1943. Bill of complaint filed; summons issued; \$5.00.

June 12, 1943. Summons returned and filed.

July 7, 1943. Amended bill of complaint filed.

Aug. 16, 1943. Defendants' answer filed; \$5.00.

Sept. 18, 1943. Order for hearing September 27, 1943, filed and entered, L. 79, p. 56.

Sept. 27, 1943. Plaintiff's motion for summary judgment filed; hearing October 25, 1943; pre-trial hearing held; motion for summary judgment set for hearing October 25, 1943.

Oct. 25, 1943. Motion for summary judgment continued to November 1, 1943 for defendants' brief.

Nov. 1, 1943. Order granting leave to file; amended answer entered; motion for summary judgment heard and submitted.

[fol. 2] Nov. 4, 1943. Order granting leave to file amended answer filed and entered; L. 81, p. 263; amended answer filed.

Dec. 28, 1943. Findings of fact and conclusions of law filed and entered; L. 83, p. 254.

Jan. 10, 1944. Judgment for plaintiff with costs to be taxed, filed and entered; \$5.00.

Jan. 11, 1944. Stipulation to amend findings of fact and conclusions of law filed; amended findings of fact and conclusions of law filed and entered.

Jan. 21, 1944. Stipulation and order amending stipulation to amend findings of fact and conclusions of law filed; order entered; stipulation to amend the amended findings

of fact and conclusions of law filed; second amended findings of fact and conclusions of law filed and entered.

Mar. 24, 1944. Claim of appeal of defendants filed; \$5.00; notice of claim of appeal filed.

Mar. 25, 1944. Proof of mailing of notice of appeal filed; supersedeas bond in \$250.00 filed; National Surety Corporation Security March 20, 1944.

Apr. 18, 1944. Statement of points relied on by appellants filed.

Apr. 25, 1944. Designation of contents of the Record on Appeal.

Apr. 25, 1944. Stipulation re comparison of record.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 1, 1943

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor [fol. 3] Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III

Defendant, Anna P. Boutell, resides at 1402 East Court Street in the City of Flint, Michigan, within the jurisdiction of this court and is now, and at all times hereinafter mentioned was, one of the owners and partners of a place of business located at 210 Alexis Road, Toledo, Ohio, where she is engaged as one of the partners under the name and style of F. J. Boutell Service Company in the maintenance and repair of transportation equipment of the F. J. Boutell Drive-Away Company, a Michigan corporation.

IV

Defendant, Carroll M. Boutell, resides at 1123 Glengary Circle, Bloomfield Village, Michigan, within the jurisdiction of this court, and is now, and at all times hereinafter

mentioned was, one of the owners and partners of a place of business located at 210 Alexis Road, Toledo, Ohio, where he is, with other partners, engaged under the name and style of F. J. Boutell Service Company, in the maintenance and repair of the transportation equipment of the F. J. Boutell Drive-Away Company, a Michigan corporation.

V

At all times hereinafter mentioned, the defendants employed and are employing approximately 32 employees in and about their said place of business in Toledo, Ohio, in the repair and maintenance of motor transportation equipment and in processes and occupations necessary to motor transportation. The motor transportation equipment, consisting of trucks, tractors and trailers, that is maintained [fol. 4] and repaired by the defendants' employees is owned by the F. J. Boutell Drive-Away Company, a Michigan corporation engaged in the transportation of automobiles and army equipment such as jeeps and armored trucks. The automobiles and army equipment are transported by the F. J. Boutell Drive-Away Company in interstate commerce into and through states other than the states of Ohio and Michigan. The employees of the defendants by reason of their employment in the manner aforesaid are engaged in interstate commerce.

VI

Defendants repeatedly have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of their employees engaged in interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42 and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed.

VII

Defendants have, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Section 15(a)(2) of the Act, both permanently and during the pendency of this action, [fol. 5] and such other and further relief as may be necessary and appropriate.

(Sgd.) Irving J. Levy, Acting Solicitor; (Sgd.) Charles A. Reynard, Regional Attorney; (Sgd.) Franklyn W. Bair, Attorney, United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: % Wage and Hour Division, U. S. Department of Labor, 4094, Main Post Office Building; or % Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed July 7, 1943

I

Plaintiff brings this, his amended complaint as a matter of course before filing or service of a responsive pleading to his original complaint filed herein on June 1, 1943, to enjoin defendants from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

[fol. 6]

III

F. J. Boutell Service Company is a partnership consisting of Anna P. Boutell, Carroll M. Boutell, Marvin E. Boutell, and Wilbur H. Boutell, partners. Said partnership, by its partners, maintains a place of business located at 210 Alexis Road in the City of Toledo, Lucas County, Ohio, where it is engaged in the maintenance and repair of transportation equipment owned and operated by the

F. J. Boutell Drive-Away Company, a Michigan corporation.

Said partnership, F. J. Boutell Service Company, named in this complaint is not made a party to this action because it is not subject to the jurisdiction of this Court.

IV

Defendant, Anna P. Boutell, resides at 1402 East Court Street in the City of Flint, Michigan, within the jurisdiction of this Court and is now, and at all times hereinafter mentioned was, one of the owners and partners of the partnership hereinabove mentioned, F. J. Boutell Service Company.

V

Defendant, Carroll M. Boutell, resides at 1123 Glengary Circle, Bloomfield Village, Michigan, within the jurisdiction of this Court, and is now, and at all times hereinafter mentioned was, one of the owners and partners of the partnership hereinabove mentioned, F. J. Boutell Service Company.

VI

Marvin E. Boutell named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this Court.

Wilbur H. Boutell named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this Court.

[fol. 7]

VII

At all times hereinafter mentioned, the defendants employed and are employing approximately 32 employees in and about their said place of business in Toledo, Ohio in the repair and maintenance of motor transportation equipment and in processes and occupations necessary to motor transportation. The motor transportation equipment, consisting of trucks, tractors and trailers, that is maintained and repaired by the defendants' employees is owned by the F. J. Boutell Drive-Away Company, a Michigan corporation engaged in the transportation of automobiles and army equipment such as jeeps and armored trucks. The automobiles and army equipment are transported by the F. J. Boutell Drive-Away Company in interstate commerce.

into and through states other than the states of Ohio and Michigan. The employees of the defendants by reason of their employment in the manner aforesaid are engaged in interstate commerce.

VIII

Defendants repeatedly have violated and are violating the provisions of sections 7 and 15(a)(2) of the Act by employing many of their employees engaged in interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed.

IX

Defendants have, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by section 17 of the Act.

[fol. 8] Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of section 15(a)(2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

(Sgd.) Douglas B. Maggs, Solicitor; Irving J. Levy, Associated Solicitor; Charles A. Reynard, Regional Attorney; Franklyn W. Bair, Attorney; United States Department of Labor; Attorneys for Plaintiff. Post Office Address: U. S. Department of Labor, 4094 Post Office Building, Cleveland 13, Ohio, or Office of the Solicitor, Department of Labor, Washington 25, D. C.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 16, 1943

Now comes Anna M. Boutell, who is designated in plaintiff's Amended Bill of Complaint at Anna P. Boutell, but which should be Anna M. Boutell, and Carroll M. Boutell, d. b. a. F. J. Boutell Service Company, by their attorneys, [fol. 9] Prescott and Coulter, and by way of answer to plaintiff's amended bill of complaint allege:

I

The allegations contained in Paragraph I of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

II

The allegations contained in Paragraph II of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

III

It is admitted that the F. J. Boutell Service Company is a partnership consisting of Anna M. Boutell, Carroll M. Boutell, Marvin E. Boutell and Wilbur H. Boutell, partners, said partnership, by its partners, maintaining a place of business located at 210 Alexis Road in the City of Toledo, Lucas County, Ohio, where it is engaged in the maintenance and repair of transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation. However, the remaining allegations contained in paragraph III are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

IV

The allegations contained in Paragraph IV are admitted.

V

The allegations contained in Paragraph V are admitted.

VI

The allegations contained in Paragraph VI are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

[fol. 10]

VII

The allegations contained in Paragraph VII are admitted.

VIII

The allegations contained in Paragraph VIII are denied in such detail as though herein again repeated, with the exception of the allegation that the F. J. Boutell Service Company are employing many of the employees for work weeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed, which is admitted.

IX

The allegations contained in Paragraph IX of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

AFFIRMATIVE DEFENSE

By way of further answer to the plaintiff's amended bill of complaint, defendants allege:

I

The only employees involved in this action are mechanics who are now and have been engaged exclusively in the repair and maintenance of motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation, which for more than a year prior hereto has been engaged in the transportation of Army Ordnance materiel, and which prior to that time had been engaged in the transportation of automobiles.

II

The above-mentioned employees by reason of being engaged in the repair and maintenance of motor transportation equipment are thereby performing work related to the safety of operation of the equipment owned and operated by the F. J. Boutell Drive-Away Company.

III

Since 1939 the F. J. Boutell Service Company has been operating under a labor contract which specified the number of hours to be worked and the wages to be paid its employees. The Union contract under which the F. J. Boutell Service Company is presently operating is known and designated as a standard city-wide form of labor contract in the Toledo Area. The contract under which the F. J. Boutell Service Company is now operating is one entered into with Local 1042, International Association of Machinists, which contract will expire on March 5, 1944, a copy of which marked Exhibit "1" is attached hereto and made a part hereof. The first labor contract entered into in 1939 contained the previously established workweek and in this respect there has been no change in subsequent contracts.

IV

The F. J. Boutell Service Company is not violating and has not violated any of the provisions of the Fair Labor Standards Act, so-called, for the reason that it is exempt from the operation of the Fair Labor Standards Act by reason of Section 13 (b) (1) thereof, which provides that it "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935." Section 204 (a) (1) of the Motor Carrier Act of 1935 provides as follows:

(a) "It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifica-

[fol. 12] tions and maximum hours of service of employees and safety of operation and equipment."

By virtue of the provisions of the section last above quoted, the Interstate Commerce Commission has exclusive jurisdiction to regulate the hours of work of all of the employees involved in this proceeding who are mechanics employed in connection with maintenance and repair of equipment closely related to the safety of operations of said equipment.

Wherefore, the defendants pray that said amended bill of complaint may be dismissed by this Honorable Court with costs to the defendants.

(Sgd.) Prescott & Coulter, Attorneys for Defendants,
1703 Ford Building, Detroit, Michigan. Carton,
Gault & Davison, Attorneys of Counsel for Defendants,
903 Genesee Bank Building, Flint, Michigan.

Dated: Detroit, Michigan, August 16, 1943.
True copy.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed November 4, 1943

Now comes Anna M. Boutell, who is designated in plaintiff's Amended Bill of Comp-a-nt as Anna P. Boutell, but which should be Anna M. Boutell, and Carroll M. Boutell, d. b. a. F. J. Boutell Service Company, by their attorneys, Prescott and Coulter, and by way of answer to plaintiff's amended bill of complaint allege:

[fol. 13]

I

The allegations contained in Paragraph I of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.*

II

The allegations contained in Paragraph II of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

III

It is admitted that the F. J. Boutell Service Company is a partnership consisting of Anna M. Boutell, Carroll M. Boutell, Marvin E. Boutell and Wilbur H. Boutell, partners, said partnership, by its partners, maintaining a place of business located at 210 Alexis Road in the City of Toledo, Lucas County, Ohio, where it is engaged in the maintenance and repair of transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation. However, the remaining allegations contained in paragraph III are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

IV

The allegations contained in Paragraph IV are admitted.

V

The allegations contained in Paragraph V are admitted.

VI

The allegations contained in Paragraph VI are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

[fol. 14]

VII

The allegations contained in Paragraph VII are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

VIII

The allegations contained in Paragraph VIII are denied in such detail as though herein again repeated, with the exception of the allegation that the F. J. Boutell Service Company are employing many of the employees for work weeks longer than 44 hours during the year beginning October 24, 1938, for work weeks longer than 42 hours during the year beginning October 24, 1939, and for work weeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in work weeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed, which is admitted.

IX

The allegations contained in Paragraph IX of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

AFFIRMATIVE DEFENSE

By way of further answer to the plaintiff's amended bill of complaint, defendants allege:

I

The only employes involved in this action are mechanics who are now and have been engaged exclusively in the repair and maintenance of motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation, which for more than a [fol. 15] year prior hereto has been engaged in the transportation of Army Ordnance materiel, and which prior to that time had been engaged in the transportation of automobiles.

II

The above-mentioned employees by reason of being engaged in the repair and maintenance of motor transportation equipment are thereby employed by a service establishment.

III

The above-mentioned employees by reason of being engaged in the repair and maintenance of motor transportation equipment are thereby performing work related to the safety of operation of the equipment owned and operated by the F. J. Boutell Drive-Away Company.

IV

Since 1939 the F. J. Boutell Service Company has been operating under a labor contract which specified the number of hours to be worked and the wages to be paid its employees. The Union contract under which the F. J. Boutell Service Company is presently operating is known and designated as a standard city-wide form of labor contract in the Toledo Area. The contract under which the F. J. Boutell Service Company is now operating is one

entered into with Local 1042, International Association of Machinists, which contract will expire on March 5, 1944, a copy of which marked Exhibit "1" is attached hereto and made a part hereof. The first labor contract entered into in 1939 continued the previously established workweek and in this respect there has been no change in subsequent contracts.

V

The F. J. Boutell Service Company is not violating and has not violated any of the provisions of the Fair Labor Standards Act, so-called, for the reason that it is exempt from the operation of the Fair Labor Standards Act by reason of Section 13(a) (2) thereof, which provides that it [fol. 16] "shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

By virtue of the provisions of the section last above quoted, the employees involved in this proceeding are exempt from the Fair Labor Standards Act inasmuch as the defendant is a service establishment the greater part of whose servicing is in intrastate commerce.

VI

The F. J. Boutell Service Company is not violating and has not violated any of the provisions of the Fair Labor Standards Act, so-called, for the reason that it is exempt from the operation of the Fair Labor Standards Act by reason of Section 13 (b) (1) thereof, which provides that it "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935." Section 204 (a) (1) of the Motor Carrier Act of 1935 provides as follows:

(a) "It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

By virtue of the provisions of the section last above quoted, the Interstate Commerce Commission has exclusive jurisdiction to regulate the hours of work of all of the employees involved in this proceeding who are mechanics employed in connection with maintenance and repair of equipment closely related to the safety of operations of said equipment.

[fol. 17] Wherefore, the defendants pray that said amended bill of complaint may be dismissed by this Honorable Court with costs to the defendants.

(Sgd.) Prescott & Coulter, Attorneys for Defendants,
1703 Ford Building, Detroit, Michigan. Carton,
Gault & Davison, Of Counsel, 903 Genesee Bank
Building, Flint, Michigan.

Dated: Detroit, Michigan, October 25, 1943.

IN UNITED STATES DISTRICT COURT

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND NOTICE
OF MOTION—Filed September 27, 1943**

To Prescott & Coulter, 1703 Ford Building, Detroit, Michigan.

SIRS:

Please take notice that upon the amended complaint and answer filed herein, the undersigned will move this Court at Room 712, United States Courts and Post Office Building, City of Detroit, on the 25th day of October, 1943, at 10 o'clock A. M., of that day or as soon thereafter as counsel can be heard, for an order granting summary judgment in favor of the plaintiff in accordance with the prayer of the amended complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings consisting of said amended complaint and answer, show there is no genuine issue as to any material fact and that [fol. 18] the plaintiff is entitled to a judgment as a matter of law, or for such other and further relief as the Court may deem just, with costs.

(Sgd.) Douglas B. Maggs, Solicitor; Irving J. Levy,
Associate Solicitor; Charles A. Reynard, Regional
Attorney; Franklyn W. Bair, Attorney; Attorneys
for Plaintiff.

Service of a copy of the foregoing motion has been made on counsel for defendant by personally handing him a copy of the same this 27th day of September, 1943.

(Sgd.) Charles A. Reynard, Regional Attorney, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed December 28, 1943

FINDINGS OF FACT

This case comes up on a motion for summary judgment in accordance with the provisions of Rule 56 of the Rules of Civil Procedure. The motion is based entirely upon the amended complaint and amended answer; but at the oral argument on the motion it was conceded that the facts were as set forth in the defendant's brief, and this statement of facts is adopted as the findings of fact of the court, and are as follows:

[fol. 19] 1. The defendants are members and part owners of a partnership which does business under the name and designation of the F. J. Boutell Service Company. Wilbur H. and Marvin E. Boutell are the remaining members of the said partnership, but are not named as parties defendant for the reason that they are not within the jurisdiction of this court.

2. The defendants in their partnership operation maintain a place of business at 210 Alexis Road in the City of Toledo, Ohio, where they are engaged in the repair and maintenance of motor transportation equipment. The motor transportation equipment, consisting of trucks, trailers and tractors, upon which the employees of the F. J. Boutell Service Company exclusively work is owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the F. J. Boutell Service Company. However, the four above-mentioned partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company.

3. The F. J. Boutell Drive-Away Company has for more than a year prior hereto been engaged in the transportation of Army Ordnance materiel in interstate commerce, and prior to that time had been engaged in the transportation of new automobiles to distributors.

(It was admitted at the oral argument that substantially all of the business of the F. J. Boutell Drive-Away Company has been in interstate commerce.)

4. The defendants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and since the effective date of the Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate.

[fol. 20] At the present time a labor contract is in existence between Local 1042 of the International Association of Machinists and the F. J. Boutell Service Company.

CONCLUSIONS OF LAW

There being no genuine issue as to any of the material facts involved, and it appearing that plaintiff is entitled to judgment in accordance with the prayer of its amended complaint, such a judgment may be submitted for entry on Monday, January 10, 1944, at eleven a. m.

(Sgd.) Arthur F. Lederle, District Judge.

Dated December 28, 1943.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed January 10, 1944

This matter coming on to be heard upon the amended complaint of plaintiff, the amended answer of defendant, plaintiff's motion for summary judgment and the briefs and oral argument of both parties; and the Court having heretofore made its conclusions of law in which it found

that plaintiff is entitled to judgment in accordance with the prayer of his amended complaint,

Now, therefore it is by the Court

Ordered, adjudged and decreed that defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of section 15(a) (2) of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, [fol. 21] 52 Stat. 1060, U. S. C. Title 29, Sec. 201, et seq.) hereinafter referred to as the Act, in any of the following manners:

The defendant shall not, contrary to section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, as defined by the Act, for a workweek longer than forty hours, unless the employee receives compensation for his employment in excess of forty hours at a rate not less than one and one-half times the regulate rate at which he is employed.

It is further ordered, adjudged and decreed that the costs be, and they hereby are, assessed against defendants.

Arthur F. Lederle, United States District Judge.

Dated January 10, 1944.

**STIPULATION TO AMEND FINDINGS OF FACT AND CONCLUSIONS
OF LAW—Filed January 11, 1944**

It is hereby stipulated between the parties to the above entitled cause through their respective counsel that the Findings of Fact and Conclusions of Law submitted and entered by Judge Lederle on Monday, January 10, 1944, at eleven o'clock, a. m., shall be amended in the following manner:

FINDING OF FACT

4. The defendants' employes involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and [fol. 22] are therefore engaged in activities affecting the safety of operation of motor vehicles owned and operated in interstate commerce, and since the effective date of the

Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission, beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate.

CONCLUSIONS OF LAW

1. The employees of the F. J. Boutell Service Company are not employees of a "carrier" and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act.
2. The F. J. Boutell Service Company is not a retail or service establishment as defined in the Act, since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public.

(Sgd.) Charles A. Reynard, Regional Attorney;
Carton, Gault & Davison, Of Counsel; Prescott
& Coulter, Attorneys for Defendants.

Dated: Detroit, Michigan, January 11, 1944.

[fol. 23] IN UNITED STATES DISTRICT COURT

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed
January 11, 1944

FINDINGS OF FACT

This case comes up on a motion for summary judgment in accordance with the provisions of Rule 56 of the Rules of Civil Procedure. The motion is based entirely upon the amended complaint and amended answer; but at the oral argument on the motion it was conceded that the facts were as set forth in the defendant's brief, and this statement of facts is adopted as the findings of fact of the court, and are as follows:

1. The defendants are members and part owners of a partnership which does business under the name and designation of the F. J. Boutell Service Company. Wilbur H. and Marvin E. Boutell are the remaining members of the said partnership, but are not named as parties defendant

for the reason that they are not within the jurisdiction of this court.

2. The defendants in their partnership operation maintain a place of business at 210 Alexis Road in the City of Toledo, Ohio, where they are engaged in the repair and maintenance of motor transportation equipment. The motor transportation equipment consisting of trucks, trailers and tractors, upon which the employees of the F. J. Boutell Service Company exclusively work is owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the F. J. Boutell Service Company. However, the four above-mentioned partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company.

3. The F. J. Boutell Drive-Away Company has for more than a year prior hereto been engaged in the transportation [fol. 24] of Army Ordnance materiel in interstate commerce, and prior to that time had been engaged in the transportation of new automobiles to distributors.

(It was admitted at the oral argument that substantially all of the business of the F. J. Boutell Drive-Away Company has been interstate commerce.)

4. The defendants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and are therefore engaged in activities affecting the safety of operation of motor vehicles owned and operated in interstate commerce, and since the effective date of the Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission, beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate.

At the present time a labor contract is in existence between Local 1042 of the International Association of Machinists and the F. J. Boutell Service Company.

CONCLUSIONS OF LAW

1. The employees of the F. J. Boutell Service Company are not employees of a "carrier" and are therefore not

subject to the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act.

2. The F. J. Boutell Service Company is not a retail or service establishment as defined in the Act, since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public.

There being no genuine issue as to any of the material facts involved, and it appearing that plaintiff is entitled to judgment in accordance with the prayer of its amended complaint, such a judgment may be submitted for entry on Monday, January 10, 1944, at eleven o'clock A. M.

(Sgd.) Arthur F. Lederle, District Judge.

Dated: January 21, 1944.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION TO AMEND THE AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 21, 1944

It is hereby stipulated between the parties to the above entitled cause, through their respective counsel, that the Amended Findings of Fact and Conclusions of Law entered by Judge Lederle on Tuesday, January 11, 1944, at eleven o'clock A. M., shall be amended in the following manner:

Conclusions of Law

"1. The employees of the F. J. Boutell Service Company are not employees of a 'carrier' and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act.

"2. The F. J. Boutell Service Company is not a retail or service establishment as defined in the Act, since the greater part of its servicing or selling is not in intrastate commerce, and since it does not serve the general consuming public.

"There being no genuine issue as to any of the material facts involved, and it appearing that plaintiff is entitled to judgment in accordance with the prayer of

its amended complaint, such a judgment may be submitted for entry on Monday, January 10, 1944 at eleven o'clock, A. M."

(Sgd.) Charles A. Reynard, Regional Attorney;
Carton, Gault & Davison, Of Counsel; Prescott
& Coulter, Attorneys for Defendants.

Dated: January 21, 1944.

[fol. 26] IN UNITED STATES DISTRICT COURT

**ORDER AMENDING STIPULATION TO AMEND FINDINGS OF FACT
AND CONCLUSIONS OF LAW—Filed January 21, 1944**

At a session of said Court held in the Federal Building in the City of Detroit, Wayne County, Michigan, on this 21st day of January, A. D. 1944.

Present: Honorable Judge Arthur F. Lederle, District Judge.

Upon reading and filing the attached stipulation;

It is hereby ordered that the Stipulation to Amend Findings of Fact and Conclusions of Law is hereby amended as follows:

"It is hereby stipulated between the parties to the above entitled cause through their respective counsel that the findings of fact and conclusions of law submitted and entered by Judge Lederle on December 28, 1943, shall be amended in the following manner."

(Sgd.) Arthur F. Lederle, District Judge.

IN UNITED STATES DISTRICT COURT

**STIPULATION TO AMEND THE STIPULATION TO AMEND FINDINGS
OF FACT AND CONCLUSIONS OF LAW—Filed January 21,
1944**

It is hereby stipulated between the parties to the above entitled cause, through their respective counsel, that the Stipulation to Amend Findings of Fact and Conclusions of

[fol. 27] Law, dated January 11, 1944, shall be amended in the following manner:

"It is hereby stipulated between the parties to the above entitled cause through their respective counsel that the findings of fact and conclusions of law submitted and entered by Judge Lederle on December 28, 1943, shall be amended in the following manner."

(Sgd.) Charles A. Reynard, Regional Attorney;
Carton, Gault & Davison, Of Counsel; Prescott &
Coulter, Attorneys for Defendants.

Dated: Detroit, Michigan, January 21, 1944.

IN UNITED STATES DISTRICT COURT

NOTICE OF CLAIM OF APPEAL—Filed March 24, 1944

To: Irving J. Levy, Charles A. Reynard, and Franklyn W. Blair, Attorneys for Plaintiff and Appellee, 4094 Main Post Office Building, Cleveland, Ohio.

Please take notice that a claim of appeal from the judgment entered by the Honorable Arthur F. Lederle, Judge of the United States District Court, Eastern District of Michigan, entered on January 10, 1944, of which the attached is a true copy, was filed in the office of the Clerk of the United States District Court, Eastern District of Michigan, on March 24, 1944, at which time the appeal fee in the [fol. 28] amount of Five and no/100 (\$5.00) dollars was paid by said defendants and appellants.

(Sgd.) Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

Dated: March 24, 1944.

IN UNITED STATES DISTRICT COURT

CLAIM OF APPEAL—Filed March 24, 1944

Anna M. Boutell and Carroll M. Boutell d/b/a F. J. Boutell Service Company, defendants and appellants in

the above entitled cause, claim an appeal from the judgment entered on the 10th day of January, 1944, by the Honorable Arthur F. Lederle, Judge of the United States District Court, Eastern District of Michigan. Defendants and appellants take a general appeal therefrom.

Dated at Detroit, Michigan, this 24th day of March, A. D. 1944.

(Sgd.) Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 29] IN UNITED STATES DISTRICT COURT

SUPERSEDEAS BOND—Filed March 25, 1944

Know all men by these presents, that we, Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, of the County of Wayne and State of Michigan, as principals, and National Surety Corporation as surety, are held and firmly bound unto L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, the above-named plaintiff and appellee, in the sum of two hundred and fifty and no/100 (\$250.00) dollars good and lawful money of the United States of America, to be paid unto the said L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, or to his certain attorney, successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, and each and every one of them, firmly by these presents.

Sealed with our seals and dated the 20th day of March, A. D. 1944.

Whereas, the above-named Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, defendants and appellants, have appealed from the summary judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, which judgment was entered on the 10th day of January, 1944, and in which cause of action Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, were

defendants, and L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, was plaintiff, and under the terms and conditions of which judgment the defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, are permanently enjoined and restrained from violating the provisions of Section 15(a) (2) of the Fair Labor Standards Act, and now desire a stay on appeal;

[fol. 30] Now, therefore, the condition of this obligation is such that if the said Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, shall satisfy the terms and conditions of said judgment in full, unless reversed, together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interests and damages as the Appellate Court may charge and award, then this obligation shall be void; but otherwise shall remain in full force and effect.

(Sgd.) Anna Boutell, Carroll M. Boutell, d/b/a F. J. Boutell Service Company, Principals. Surety: National Surety Corporation, by R. L. Crossley.

Approved: Arthur F. Lederle (Sgd.), Judge of the U. S. District Court, Eastern District of Michigan.

Approved as to form: Charles A. Reynard (Sgd.), Attorney for Plaintiff and Appellee, March 22, 1944.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED ON BY APPELLANTS—Filed April 18, 1944

Pursuant to the Federal Rules of Civil Procedure, Rule 75-D the above-named defendants and appellants hereby state that in prosecuting their appeal to the Circuit Court of Appeals for the Sixth District they will rely upon the following points:

[fol. 31] (1) That the Court erred in finding that the employees of the F. J. Boutell Service Company were not subject to the exemption provided in Section 13(b) (1) of the Fair Labor Standards Act.

(2) That the Court erred in finding that the defendants and appellants herein have violated and are violating the provisions of Section 15(a) (2) of the Fair Labor Standards Act, during the period in question, by continuously employing their employees employed as mechanics for workweeks in excess of the maximum number of hours prescribed in Section 7 of the Fair Labor Standards Act without compensating the said employees for such overtime employment at a rate not less than one and one-half times the regular rates at which they were employed.

(3) That the Court erred in finding that the plaintiff and appellee herein is entitled to the injunction prayed for in the amended complaint.

(4) That the Court erred in entering a summary judgment on the amended bill of complaint of plaintiff and appellee herein against the defendants and appellants herein.

(5) That the Court erred in finding that the employees of the F. J. Boutell Service Company were not subject to the exemption provided in Section 13(a) (2) of the Fair Labor Standards Act.

And for the errors aforesaid, the said Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, say that the summary judgment of January 10, 1944, entered in said cause ought to be reversed, vacated and held for naught.

(Sgd.) Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit (26), Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 32] IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN PROOF OF MAILING STATEMENT OF POINTS RELIED ON BY APPELLANTS—Filed April 18, 1944

STATE OF MICHIGAN,
County of Wayne, ss:

Mary H. Busse, being duly sworn, deposes and says that she is employed in the office of Prescott and Coulter, at

torneys for Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, defendants and appellants in the above cause.

Deponent says that on the 18th day of April, 1944, she personally mailed to Charles A. Reynard, attorney for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff and appellee, a true copy of Statement of Points Relied On by Appellants, a copy of which is attached hereto and reference to which is prayed. That said Statement was mailed by placing the same in an envelope addressed to said Charles A. Reynard, at 4094 Post Office Building, Cleveland 13, Ohio, and bearing the notation "Registered Mail, Return Receipt Requested, Deliver to Addressee Only," with sufficient postage prepaid, which envelope was deposited with the Registry Division of the United States Post Office, Penobscot Branch, Detroit, Michigan.

Further deponent sayeth not.

Mary H. Busse.

Subscribed and sworn to before me this 18th day of April, 1944. Helen Czarnik, Notary Public, Wayne County, Michigan. My commission expires March 2, 1945.

[fol. 33] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF THE RECORD ON APPEAL—Filed April 25, 1944

It is hereby stipulated by and between the attorneys for the respective parties hereto that the following constitute the contents of record on appeal:

- (1) Calendar entries.
- (2) Complaint.
- (3) Amended complaint.
- (4) Answer.
- (5) Amended answer.
- (6) Plaintiff's motion for summary judgment and notice of motion.
- (7) Findings of Fact and Conclusions of Law.
- (8) Judgment.

(9) Stipulation to Amend Findings of Fact and Conclusions of Law.

(10) Amended Findings of Fact and Conclusions of Law.

(11) Stipulation to Amend the Amended Findings of Fact and Conclusions of Law.

(12) Order Amending Stipulation to Amend Findings of Fact and Conclusions of Law.

(13) Notice of Claim of Appeal and Claim of Appeal.

(14) Supersedeas Bond.

(15) Statement of Points Relied on by Appellants and Proof of Service thereof.

[fol. 34] (16) Stipulation re Comparison of Record.

(17) Designation of Contents of the Record on Appeal.

(18) Certificate of Clerk.

(Sgd.) Charles A. Reynard, Attorney for Plaintiff and Appellee, 4094 Post Office Building, Cleveland 13, Ohio. Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan,

[fol. 35] IN UNITED STATES DISTRICT COURT

STIPULATION RE COMPARISON OF RECORD—Filed April 25, 1944

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

(Sgd.) Charles A. Reynard, Attorney for Plaintiff and Appellee, 4094 Post Office Building, Cleveland 13, Ohio. Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—December 4, 1944

Before: Allen, Hamilton and McAllister, JJ.

This cause is argued by Jack Newcombe for Appellants and by George M. Szabad for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered February 14, 1945

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 38] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed February 14, 1945

Before Allen, Hamilton and McAllister, Circuit Judges

Allen, Circuit Judge. The sole question presented by this appeal is whether certain mechanics, employees of a partnership engaged exclusively in repairing and maintaining motor trucks used by a carrier in interstate commerce, are exempt from the provisions of the Fair Labor Standards Act under Section 13(a)(2) and (b)(1) of that enactment, Title 29, U. S. C., Section 201 et seq. The appellee filed a complaint joining the appellants, two mem-

bers of a partnership employing at their place of business in Toledo, Ohio, approximately 32 employees who service motor transportation equipment owned by the F. J. Boutell Drive-Away Company (a Michigan corporation, herein-after called the Drive-Away Company) engaged in the interstate transportation of automobiles and army equipment such as jeeps and armored trucks. Other members of the partnership were not joined as parties defendant for the reason that they were not within the jurisdiction of the District Court. The bill charged that the appellants have repeatedly "violated and are violating the provisions of Sections 7 and 15 (a) (2) of the Act by employing many of their employees engaged in interstate commerce *** for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42 and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed."

The appellants' answer admitted that the automobiles and army equipment transported by the Drive-Away Company were carried in interstate commerce and that the appellants' employees, by reason of their employment, were engaged in interstate commerce. In an amended answer later filed to an amended complaint which made [fol. 39] the same allegations with reference to the interstate operation this was neither admitted nor denied. The material allegations of the complaint and amended complaint were either admitted or neither admitted nor denied, appellants' defense being grounded on the claim that their employees are exempt from the requirements of the Fair Labor Standards Act under its specific provisions.

Upon motion for summary judgment the court found the following facts in addition to those already stated:

"The F. J. Boutell Drive-Away Company is a Michigan corporation and is an entity separate and distinct from the F. J. Boutell Service Company. However, *** the partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company. * * *

"(It was admitted at the oral argument that substantially all of the business of the F. J. Boutell Drive-Away Company has been in interstate commerce.)

"4. The defendants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and since the effective date of the Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate."

Finding that the appellee was entitled to judgment, the court issued a permanent injunction in accordance with the prayer of the amended complaint.

Appellants' first contention, that they are entitled to exemption under Section 13(a)(2) of the statute, which exempts employees "engaged in any . . . service establishment the greater part of whose . . . servicing is in intrastate commerce," is disposed of by the finding of the court and the concession of the appellants that substantially all of the business of the Drive-Away Company is in interstate commerce. The exemption applies only to those who perform the greater part of their service in intrastate commerce, and clearly the appellants' employees do not fall within this classification.

The test under the Fair Labor Standards Act as to whether an employee is engaged in interstate commerce is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. *McLeod v. Threlkeld*, 319 U. S. 491, 497. We think the mechanics who service the motor vehicles which operate in interstate commerce are clearly a part of it. Cf. *United States v. American Trucking Associations*, 310 U. S. 534.

Appellants also contend that they are exempt from the obligation of the Fair Labor Standards Act under Section 13(b)(1), Title 29, U. S. C., Section 213(b), which provides that the maximum hours provisions of Section 207 shall not apply as to any employee with respect to whom the Interstate Commerce Commission has power

to establish qualifications and maximum hours of service as to their employees, pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935. It is urged that the Interstate Commerce Commission has such power with reference to appellants' employees under the material portions of Section 204, which read as follows:

"It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicles as provided in this chapter, and to that end the [fol. 41] mission may establish reasonable requirements with respect to uniform systems of accounts, records and reports; preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 204(e), 205, 220, 221, 222(a), (b), (d), (f), and (g), and 224."

Appellants contend that Section 204(a) of the Motor Carrier Act is to be construed in light of the intent of Congress (Cf. *United States v. American Trucking Associations, supra*, 538, 542) and that since the purpose of the Motor Carrier Act is to promote public safety, dependability and efficiency in the field of interstate motor transportation for hire, it is plain it intended this statute to cover all employees who repair motor vehicle equipment used in interstate transportation.

It is not claimed that the Drive-Away Company is a

common carrier, and the record does not disclose whether it is a contract carrier or a private carrier; but Section 204(a) of the Motor Carrier Act applies to all three classes of carriers. *Southland Gasoline Co. v. Bayley*, 319 U. S. 44, 49. The employees sought to be exempted from the operation of the Fair Labor Standards Act are not employees of the Drive-Away Company, nor of any carrier. They are employees of an ordinary partnership which performs service upon motor equipment that is used in interstate commerce.

We think that the wording of the Motor Carrier Act, its legislative history, and its administrative interpretation, demonstrate that Congress did not intend to vest the Commission, under Section 204(a), with jurisdiction [fol. 42] over employees others than carriers. In the congressional reports explaining the purpose of the enactment it was repeatedly stated that the bill was meant to cover employees of motor carriers. The Interstate Commerce Commission has always held that it has no jurisdiction over employees working in commercial garages. *Ex Parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 Interstate Commerce Commission Reports, 125, 132. This interpretation is entitled to great weight. *United States v. American Trucking Associations, supra*, 549. The Supreme Court, in *Southland Gasoline Co. v. Bayley, supra*, 48, 49, pointed out that the purpose of Section 13(b)(1) of the Fair Labor Standards Act was "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers," and concluded that "Since the employees of contract and common motor carriers *** are exempt from the Fair Labor Standards provisions for maximum hours by virtue of the same words which govern private motor carriers' employees," the exemption also covers employees of private carriers of property by motor vehicle. This holding certainly does not indicate that the exemption applies to employees of other than carriers.

We conclude that by every canon of construction it would constitute judicial legislation to distort Section 204(a) of the Motor Carrier Act of 1935 in accordance with the appellants' contentions. The District Court correctly held that the appellants' employees were not exempt, and properly issued the injunction prayed for.

The judgment is affirmed.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 849, Martino vs. Michigan Window Cleaning Company.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 49719. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 73^o Anna M. Boutell and Carroll M. Boutell, Doing Business as F. J. Boutell Service Company, Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1945. Term No. 73 O. T. 1945.

(9423)